(5)

No. 85-1940

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
F. HENRY HABICHT II
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
PETER R. STEENLAND, JR.
JACQUES B. GELIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

46 pp

QUESTION PRESENTED

Whether the United States' navigational servitude, which permits the federal government to improve navigable waters free from claims for just compensation, bars the Cherokee Nation's claim that construction of the McClellan-Kerr Arkansas River Navigation System has resulted in compensable damage to instream tribal property interests.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provisions involved	1
Statement	2
A. The McClellan-Kerr Project	2
B. The present dispute	6
Summary of argument	15
Argument:	
The Cherokee Nation is not entitled to compensation for impairment of instream tribal property resulting from the construction and operation of the McClellan-Kerr Project	17
A. The United States is not obligated to pay compensation for impairment of instream property resulting from the construction and operation of federal navigation improvement projects	17
B. The Cherokee Nation is subject to the established rules governing federal navigational improvements	22
Conclusion	35

TABLE OF AUTHORITIES

Cases:

Bowen v. *Public Agencies Opposed to Social Security Entrapment,* No. 85-521 (June 19, 1986)	28
Brewer Oil Co. v. *United States*, 260 U.S. 77	3
Cherokee Nation v. *Southern Kansas Ry.*, 135 U.S. 641	29

Cases—Continued: Page

Choctaw Nation v. *Cherokee Nation*, 393 F. Supp. 224 9
Choctaw Nation v. *Oklahoma*, 397 U.S. 620, on remand, 461 F. 2d 674, cert. denied, 409 U.S. 1039, and 490 F. 2d 521, cert. denied, 417 U.S. 946 .....8-9, 12, 16, 23, 24, 25
Choctaw Nation v. *United States*, 119 U.S. 1 . 29
Commonwealth v. *Charlestown*, 18 Mass. (1 Pick.) 180 20
City of El Paso v. *Simmons*, 379 U.S. 497 28
FPC v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 17
FPC v. *Tuscarora Indian Nation*, 362 U.S. 99 29
Gajewski v. *United States*, 327 F.2d 239 28
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 18
Gibson v. *United States*, 166 U.S. 269 ....20, 27, 30
Gilman v. *Philadelphia*, 71 U.S. (3 Wall.) 713 19
Greenleaf Lumber Co. v. *Garrison*, 237 U.S. 251 20
Home Building & Loan Ass'n v. *Blaisdell*, 290 U.S. 398 28
Kaiser Aetna v. *United States*, 444 U.S. 164 .. 22, 33
Lewis Blue Point Oyster Cultivation Co. v. *Briggs*, 229 U.S. 82, aff'g 198 N.Y. 287 ....20, 21, 26, 29, 34
Lone Wolf v. *Hitchcock*, 187 U.S. 553 31
Louisville Bridge Co. v. *United States*, 242 U.S. 409 26
Lynch v. *Clements*, 263 P.2d 153 8
Mackey v. *Coxe*, 59 U.S. (18 How.) 100 29
Martin v. *Waddell*, 41 U.S. (16 Pet.) 367 19
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 28

Cases – Continued: Page

Montana v. *United States*, 450 U.S. 544 .....16, 23, 25, 27, 29
Moore v. *United States*, 157 F.2d 760 24
Nevada v. *United States*, 463 U.S. 110 35
New Jersey v. *Sargent*, 269 U.S. 328 27
New Mexico v. *Mescalero Apache Tribe*, 462 U.S. 324 28
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 27
Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661 7
Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 19
Railroad Co. v. *Schurmeir*, 74 U.S. (7 Wall.) 272 19
Scott v. *Lattig*, 227 U.S. 229 19
Scranton v. *Wheeler*, 179 U.S. 141 .....20, 21, 22
South Carolina v. *Georgia*, 93 U.S. 4 ..... 21, 29
Stephens v. *Cherokee Nation*, 174 U.S. 445 .. 29
Union Bridge Co. v. *United States*, 204 U.S. 364 26
United States v. *Appalachian Power Co.*, 311 U.S. 377 27
United States v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53 .....19, 20, 22, 27, 29, 30, 33
United States v. *Chicago, M., St. P. & P. R.R.*, 312 U.S. 592 .....19, 20, 21, 26, 29
United States v. *Commodore Park, Inc.*, 324 U.S. 386 .....20, 21, 29
United States v. *Creek Nation*, 295 U.S. 103 .. 31
United States v. *Finch*, 548 F.2d 822 23

Cases—Continued: Page

United States v. *Grand River Dam Authority*, 363 U.S. 229 ..... 20, 25, 27
United States v. *Holt State Bank*, 270 U.S. 49 27
United States v. *Oregon*, 295 U.S. 1 27
United States v. *Rands*, 389 U.S. 121 ..... 17, 19, 20, 22, 26, 34
United States v. *Sioux Nation*, 448 U.S. 371 .. 31
United States v. *Twin City Power Co.*, 350 U.S. 222 ..... 20, 27
United States v. *Wheeler*, 435 U.S. 313 27
United States v. *Willow River Power Co.*, 324 U.S. 499 ..... 20, 27, 34
Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 .. 28
West Chicago Street R.R. v. *City of Chicago*, 201 U.S. 506 ..... 20, 26, 30
Willink v. *United States*, 240 U.S. 572 20
Wyandotte Co. v. *United States*, 389 U.S. 191 19

Constitution, Treaties and statutes:

U.S. Const.:
Art. I:
§ 8 Cl. 3 (Commerce Clause) 1, 13, 15, 17, 23, 25, 28
§ 9, Cl. 7 34
Amend. V 2, 6
Amend. X 27
Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 7
Treaty of Hopewell, Nov. 28, 1785, 7 Stat. 18 6
Treaty of Holston, July 2, 1791, 7 Stat. 39 ... 6

Statutes—Continued: Page

Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478 ..... 7, 8, 32
Treaty of June 26, 1794, 7 Stat. 43 6
Treaty of Oct. 2, 1798, 7 Stat. 62 6
Treaty of July 8, 1817, 7 Stat. 156 7
Treaty of Feb. 27, 1819, 7 Stat. 195 7
Treaty of May 6, 1828, 7 Stat. 311 7
Treaty of Jan. 17, 1837, 11 Stat. 573 7
Treaty of June 22, 1855, 11 Stat. 611..... 7
Act of July 22, 1790, ch. 33, § 1-5, 1 Stat. 137-138 7
Act of May 18, 1796, ch. 29, § 9, 1 Stat. 468 .. 20
Act of June 1, 1796, ch. 46, § 6, 1 Stat. 491 .. 20
Act of Mar. 3, 1803, ch. 27, § 17, 2 Stat. 235 . 20
Act of Mar. 26, 1804, ch. 38, § 15, 2 Stat. 289 7
Act of July 3, 1832, ch. 153, 4 Stat. 551, 553 .. 3
Act of Mar. 3, 1879, ch. 181, 20 Stat. 363, 366 4
Act of July 5, 1884, ch. 229, 23 Stat. 133, 142 . 4
Act of Aug. 11, 1888, ch. 60, 25 Stat. 400 5
Act of May 2, 1890, ch. 82, § 1, 26 Stat. 81 ... 7
Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645-646 7
Act of June 28, 1898, ch. 517, § 11, 30 Stat. 495, 497-498 8
Act of June 13, 1902, ch. 1079, 32 Stat. 331, 337 5
Act of July 1, 1902, ch. 1375, 32 Stat. 716 *et seq.*:
§ 11, 32 Stat. 717 8
§ 63, 32 Stat. 725 8

Statutes—Continued: Page

Act of Apr. 26, 1906, ch. 1876, § 27, 34 Stat. 148 8

Act of June 16, 1906, ch. 3335, § 1, 34 Stat. 267 8

Act of Mar. 2, 1907, ch. 2509, 34 Stat. 1073, 1092 5

Act of Aug. 30, 1935, ch. 831, 49 Stat. 1028, 1045 5

Act of July 24, 1946, ch. 595, 60 Stat. 634, 635-636 6

Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944 11

Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049 *et seq.*:

§ 2, 60 Stat. 1050 ..... 11, 12

§ 2(5), 60 Stat. 1050 34

§ 12, 60 Stat. 1052 11

Indian Removal Act of 1830, ch. 148, § 1, 4 Stat. 411-412 7

28 U.S.C (& Supp. II) 1292(b) 13

28 U.S.C. 1497 34

28 U.S.C. 2401 11

28 U.S.C. 2501 11

33 U.S.C. 595(a) 22, 34

43 U.S.C. 931 19

Miscellaneous:

J. Angell, *A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* (1826) 20

Miscellaneous – Continued: Page

Arkansas Riverbed Rights of the Cherokee, Choctaw, and Chickasaw Indian Nations, Hearings on S. 660 Before the Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess. (1977) 9, 10

Cherokee Nation of Oklahoma: Hearings on H.R. 2329 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 11

Department of the Interior and Related Agencies Appropriations for 1973: Hearings Before a Subcomm., of the House Comm. on Appropriations, 92d Cong., 2d Sess. Pt. 2 (1972) 9

Department of the Interior and Related Agencies Appropriations for 1980: Hearings Before a Subcomm. of the House Comm. on Appropriations, 96th Cong., 1st Sess. (1979):

Pt. 6 10

Pt. 7 10

H.R. 2329, 97th Cong., 1st Sess. (1981) 11

H.R. Doc.:

No. 195, 23d Cong., 2d Sess. (1935) 3

No. 227, 22d Cong., 1st Sess. (1832) 3

No. 758, 79th Cong., 2d Sess (1946) 5, 6

H.R. Exec. Doc.:

No. 295, 41st Cong., 2d Sess. (1870) 4, 33

No. 94, 45th Cong., 3d Sess. (1879) 4

No. 90, 49th Cong., 1st Sess. (1886) 4, 5

No. 234, 50th Cong. 1st Sess. (1888) 5

Miscellaneous – Continued: Page

H.R. Rep. 97-453, 97th Cong. 2d Sess. Pt. 1 (1982) 11

D. Hay, *Europe in the Fourteenth and Fifteenth Centuries* (1966) 18

1 W.R. Holway & Associates, *Arkansas Riverbed Project* (Nov. 1984) 32

2 Op. Att'y Gen. 402 (1830) 29

2 Op. Att'y Gen. 693 (1834) 29

6 Op. Att'y Gen. 302 (1854) 29

Restatement (Second) of Trusts (1959) 30

S. 660, 95th Cong., 1st Sess. (1977) 10

S. Exec. Doc. 26, 33d Cong., 1st Sess. (1854) . 4

S. Misc. Doc. 22, 44th Cong., 1st Sess. (1876) 4

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1940

UNITED STATES OF AMERICA, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 782 F.2d 871. The opinion of the district court (Pet. App. 25a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a) was entered on January 23, 1986. On April 22, 1986, Justice White extended the time for filing a petition for writ of certiorari to and including May 23, 1986. The petition was filed on that date and granted on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution provides in relevant part:

> The Congress shall have power * * *
>
> * * * * *
>
> [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *.

The Fifth Amendment provides in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT

The Cherokee Nation of Oklahoma contends that the United States owes just compensation for impairment of instream tribal property resulting from the construction and operation of the McClellan-Kerr Arkansas River Navigation System (the McClellan-Kerr Project). The United States has responded that the federal government's firmly established power under the Commerce Clause to improve navigable waters free from suits demanding compensation for resulting instream property damage—the so-called "navigational servitude"—bars the Cherokee Nation's claim. The district court disagreed, holding that the United States had failed to preserve its navigational servitude in the relevant Indian treaties and patents (Pet. App. 25a-28a). A divided court of appeals affirmed on different grounds, holding that the Cherokee Nation is subject to the navigational servitude, but the Tribe nonetheless "has a right to compensation for any consequent loss of property or diminution of value" to tribal interests resulting from the navigation project (*id.* at 23).

A. The McClellan-Kerr Project

The McClellan-Kerr Project is an extensive congressionally authorized navigational improvement program that links the Southern Plains states with the nation's inland waterway system.[1] The project is one of the country's largest and most important navigational improvement undertakings. It represents the culmination of congres-

---

[1] A map of the McClellan-Kerr Project is provided in the Joint Appendix (J.A. 22).

sional efforts, begun early in the nineteenth century, to realize the full commercial potential of the Arkansas River.

1. The Arkansas River originates high in the Rocky Mountains, near Leadville, Colorado, and flows southeasterly more than fourteen hundred miles through Kansas, Oklahoma and Arkansas. It is the Nation's fifth longest and thirteenth largest waterway, draining an area of more than 160,000 square miles. It is naturally navigable from its confluence with the Grand River, near Fort Gibson, Oklahoma, to its confluence with the Mississippi River. *Brewer Oil Co.* v. *United States*, 260 U.S. 77, 86 (1922).

Steamboats first appeared on the Arkansas River in the 1820's, and soon thereafter, Congress considered methods for facilitating commerce on its waters. See H.R. Doc. 227, 22d Cong., 1st Sess. (1832). Congress, recognizing the value of the Arkansas River as both a highway for trade and a means of supplying frontier military outposts (*id.* at 2-3), authorized the War Department to undertake navigational improvements. Act of July 3, 1832, ch. 153, 4 Stat. 551, 553. These improvements consisted primarily of removal of obstructions below Fort Smith, located at the border between the Arkansas Territory and western lands set aside for Indian use—the so-called "Indian Territory." See H.R. Doc. 195, 23d Cong., 2d Sess. (1835). The Army Corps of Engineers, which supervised the work, suggested that further improvements be undertaken, noting (*id.* at 3):

> This river running through the centre of Arkansas and into the Indian territories west of the Mississippi, its safe navigation is of vast importance to the commerce of those countries, and for the transportation

> of stores and munitions of war to the military posts along its banks.

River improvements continued in later years (see S. Exec. Doc. 26, 33d Cong., 1st Sess. (1854)) and Fort Gibson, located within the Indian Territory, became a center of trade (see H.R. Exec. Doc. 295, 41st Cong., 2d Sess. 33 (1870)).

In 1876, the Senate resolved to investigate whether upstream portions of the Arkansas River, as far as Pueblo, Colorado, could be made navigable. S. Misc. Doc. 22, 44th Cong., 1st Sess. (1876). The War Department made a number of attempts to improve the river upstream of Fort Gibson but eventually abandoned the projects. For example, in 1879, the Army Corps of Engineers suggested that various improvements might permit river transportation as far as Wichita, Kansas (H.R. Exec. Doc. 94, 45th Cong., 3d Sess. 8 (1879)), noting that Kansas and, to a lesser extent, the Indian Territory might derive trade benefits (*id.* at 11). Later that year, Congress appropriated $20,000 for limited improvement of the Kansas portion of the river. Act of Mar. 3, 1879, ch. 181, 20 Stat. 363, 366. Additional appropriations followed. Act of July 5, 1884, ch. 229, 23 Stat. 133, 142.

By 1886, however, the Corps had determined that efforts to render the river navigable as far as Wichita were impractical and suggested that, instead, the outer reach of proposed projects be set at Arkansas City, Kansas, located at the border between Kansas and the Indian Territory. H.R. Exec. Doc. 90, 49th Cong., 1st Sess. (1886). The Corps observed that access to river transportation would greatly benefit the farmers of southern Kansas, adding that portions of the Indian Territory are "cultivated to a considerable extent, and the local traffic derived therefrom would be of some importance" (*id.* at 2).

The Corps concluded in 1888 that even improvements as far as Arkansas City were not economically justified and suggested that efforts be concentrated to further improve navigation downstream from Fort Gibson. H.R. Exec. Doc. 234, 50th Cong., 1st Sess. (1888). That year, Congress authorized navigational improvements to the river, but specifically noted that the upstream improvements discussed (and discouraged) by the Corps should not be undertaken. Act of Aug. 11, 1888, ch. 860, 25 Stat. 400, 415.[2] Congresss, meanwhile, continued to maintain the lower reaches of the Arkansas River through the early part of the twentieth century. See, *e.g.*, Act of Mar. 2, 1907, ch. 2509, 34 Stat. 1073, 1092; Act of June 13, 1902, ch. 1079, 32 Stat. 331, 357.

2. In 1935, Congress requested the War Department to investigate the prospects for a comprehensive project to improve the navigable reaches of the Arkansas River. Act of Aug. 30, 1935, ch. 831, 49 Stat. 1028, 1045. In 1945, the Army Corps of Engineers submitted a plan that was to become the McClellan-Kerr Project. H.R. Doc. 758, 79th Cong., 2d Sess. (1946). The Corps recommended that the Arkansas River be developed under a multi-purpose scheme that would yield navigational, flood-control, and hydropower benefits (*id.* at 1-3).

Navigation was the centerpiece of the plan. The Corps would develop and maintain a nine-foot deep, 480-mile channel in the Arkansas River from its mouth at the Mississipi River to Catoosa, Oklahoma. In addition, the Corps would construct a series of locks and canals providing 420 feet of lift between the Mississippi River and

---

[2] A later Corps report suggests that competition from railroads made steamboat transportation less attractive during the era, and led to the declining interest in river development. See H.R. Doc. 758, 79th Cong., 2d Sess. 55 (1946). See also H.R. Exec. Doc. 90, 49th Cong., 1st Sess. 5 (1886) (noting the "strenuous efforts" of the railroads to develop commerce in southern Kansas).

Catoosa (H.R. Doc. 758, *supra*, at 59-66). The Corps envisioned that Oklahoma, Colorado, New Mexico, Kansas, Texas, Missouri, and Arkansas would gain improved access to water transportation, either directly or through connections with highways, pipelines, and rail lines, increasing commerce along the Arkansas River from 600,000 tons per year to more than 9 million tons per year (*id.* at 47-49, 54-55).

Congress approved the McClellan-Kerr Project in 1946. Act of July 24, 1946, ch. 595, 60 Stat. 634, 635-636. Construction commenced in 1957, and was essentially complete by 1971.

B. The Present Dispute

The Cherokee Nation of Oklahoma claims that the United States' construction of the McClellan-Kerr Project has resulted in a Fifth Amendment taking of tribal property located within the bed of the Arkansas River. That claim is premised upon the Tribe's recently established title to a portion of the Arkansas River's bed. The Tribe's title rests, in turn, upon nineteenth century treaties and patents.

1. The Cherokee people, together with the Chickasaws, Choctaws, Creeks, and Seminoles, originally inhabited the southern Appalachian region of North America. The United States, through the Treaty of Hopewell (Nov. 28, 1785, 7 Stat. 18), recognized the Cherokees as a distinct tribe possessing limited sovereignty. In the following years, the United States consummated additional treaties with the Cherokees wherein the United States purchased portions of their aboriginal lands and guaranteed their rights to lands not ceded.[3]

---

[3] See, *e.g.*, Treaty of Oct. 2, 1798, 7 Stat. 62; Treaty of June 26, 1794, 7 Stat. 43; Treaty of Holston, July 2, 1791, 7 Stat. 39. The United States also attempted to protect Indian occupancy through the

Public demand for Indian displacement eventually led the United States to adopt a policy of western relocation of Indian tribes. See Indian Removal Act of 1830, ch. 148, § 1, 4 Stat. 411-412; Act of Mar. 26, 1804, ch. 38, § 15, 2 Stat. 277, 289. The United States, in turn, entered into a series of treaties with the Cherokees that provided for their resettlement in the Arkansas Territory and beyond. See Treaty of May 6, 1828, 7 Stat. 311; Treaty of Feb. 27, 1819, 7 Stat. 195; Treaty of July 8, 1817, 7 Stat. 156.

The Cherokee relocation was completed through the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, which ceded the Cherokees' aboriginal title to lands east of the Mississippi River in exchange for fee simple title to lands within the Indian Territory. On December 31, 1838, the United States issued a patent confirming the Cherokees' title to a fourteen million acre tract that bordered and partially embraced a portion of the Arkansas River. The Chickasaw and Choctaw Tribes, through similar treaties and patents, received adjacent tracts in the Indian Territory. See Treaty of June 22, 1855, 11 Stat. 611; Treaty of Jan. 17, 1837, 11 Stat. 573; Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333.

By the end of the nineteenth century, public sentiment favored assimilation of the Indian tribes. Congress created the Oklahoma Territory from unoccupied lands within the Indian Territory (Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81) and established a commission to reach agreement with the tribes concerning allotment of tribal lands (Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645-646). The Cherokees, Choctaws, and Chickasaws eventually agreed to allot their lands and terminate tribal affairs. See Act of

---

passage of Trade and Intercourse Acts, which restricted the power of non-federal entities to deal with Indian tribes. See Act of July 22, 1790, ch. 33, §§ 1-5, 1 Stat. 137-138; see also *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661, 668 n.4 (1974).

July 1, 1902, ch. 1375, §§ 11, 63, 32 Stat. 716, 717, 725; Act of June 28, 1898, ch. 517, § 11, 30 Stat. 495, 497-498. Congress thereafter provided for the disposition of Indian land, subject to the condition that any remaining property would "be held in trust by the United States for the use and benefit of the Indians." Act of Apr. 26, 1906, ch. 1876, § 27, 34 Stat. 148. Two months later, Congress created the State of Oklahoma from the Oklahoma and Indian Territories. Act of June 16, 1906, ch. 3335, § 1, 34 Stat. 267. It was generally assumed that the State of Oklahoma, upon statehood, received title under the Equal Footing Doctrine to the bed of all navigable portions of the Arkansas River. See, *e.g, Lynch* v. *Clements*, 263 P.2d 153 (Okla. 1953).

2. In 1966, the Cherokee, Chickasaw, and Choctaw Tribes initiated a lawsuit to establish Indian ownership of an 87-mile portion of the riverbed from the confluence of the Arkansas and Grand Rivers to the Arkansas-Oklahoma border. The Cherokee Nation specifically asserted that the Treaty of New Echota and the 1838 patent granting the Tribe fee simple title to lands within the Indian Territory gave the Tribe ownership of the riverbed. The Tribe further asserted that, while most of the Indian lands were later allotted and passed to non-Indian control, the riverbed remained under tribal ownership, held in trust by the United States.

The dispute between the Tribes and the State of Oklahoma eventually reached this Court, where the United States participated as amicus curiae supporting the Tribes' claim of ownership. The Court ruled that the nineteenth century treaties and patents did grant the Tribes fee simple title to the disputed portions of the riverbed. *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970). The Tenth Circuit concluded on remand that the Tribes hold present title as against the State of Oklahoma (461 F.2d 674, 678, cert. denied, 409 U.S. 1039 (1972)) and later

affirmed a trial court judgment awarding the tribes $786,541.67, based upon an accounting of the revenues derived by Oklahoma from riverbed mineral leases (490 F.2d 521, 523-524, cert. denied, 417 U.S. 946 (1974)).[4]

Following this Court's decision in *Choctaw Nation*, Congress appropriated funds to the Department of the Interior to appraise the riverbed for the purpose of assisting the Tribes in managing the property.[5] Interior, in turn, commissioned independent appraisers to conduct a valuation. The appraisal, completed in 1976, estimated the aggregate value of the Indian interests, including the value attributable to land rentals, minerals, recreation, dam sites and hydroelectric power generation, at $177 million.[6]

---

[4] A special three-judge panel later determined a title dispute among the tribes concerning ownership of the riverbed. See *Choctaw Nation* v. *Cherokee Nation,* 393 F. Supp. 224, 246 (E.D. Okla. 1975). Under that decision, the Cherokee Nation holds title to the entire riverbed from the Arkansas River's confluence with the Grand River to its confluence with the Canadian River (a distance of approximately 37 miles) and to the northern half of the bed from the Canadian River to the Arkansas-Oklahoma border (a distance of approximately 50 miles).

[5] These appropriations, which totaled more than $1.2 million, were intended to "enable the tribes to make technical decisions and enter into real estate management agreements." *Department of the Interior and Related Agencies Appropriations for 1973: Hearings Before a Subcomm. of the House Comm. on Appropriations,* 92d Cong., 2d Sess. Pt. 2, at 171 (1972) (Bureau of Indian Affairs Budget Justification).

[6] See *Arkansas Riverbed Rights of Cherokee, Choctaw, and Chickasaw Indian Nations, Hearings on S. 660 Before the Senate Select Committee on Indian Affairs,* 95th Cong., 1st Sess. 13-14 (1977) [hereinafter cited as *S. 660 Hearings*]. The Tribe, through further government funding, later contracted for the preparation of an additional appraisal estimating the fair royalty value of the riverbed. See 1 W.R. Holway & Associates, *Arkansas Riverbed Project* 3-1 to 3-3 (Nov. 1984). We have previously lodged a copy of volume 1 of that appraisal, which sets forth the relevant figures,with the Clerk of the Court (see U.S. Reply Memo. 3 n.2).

The Tribes, relying on the 1976 appraisal, sought to lease their riverbed property to the United States. Officials within the Department of the Interior initially supported legislation that would have authorized the Department to negotiate a lease agreement. See S. 660, 95th Cong., 1st Sess. (1977). However, the Interior Department later withdrew its support and the legislation was not enacted.[7] The Cherokee Nation then requested that the United States pay $8.5 million as compensation for instream damage to sand and gravel deposits allegedly washed away by the construction of the McClellan-Kerr Project. The Department of the Interior and the Army Corps of Engineers, relying on the United States' navigational servitude, ultimately concluded that the claim lacked legal merit, and Congress refused to fund the claim.[8]

In 1981, the Oklahoma congressional delegation introduced a bill to permit the Cherokee Nation to litigate its claim for compensation. The bill conferred jurisdiction on the United States District Court for the Eastern District

---

[7] See *S. 660 Hearings* 18-22. The Interior Department witness explained the government's opposition to the legislation as follows (*id.* at 22):

> While, under the doctrine of navigational servitude, there is no precedent which obligates the Federal Government to pay damages, the Secretary can and will review the resources owned by the tribes without legislative direction. Upon completion of that review, we will submit to Congress our recommendations as to the appropriateness of any acquisition or compensation, or assistance to the tribes for leasing the minerals to third parties.

The Department of the Army also opposed the legislation, noting that the government "does not compensate private owners, or the State which owns the riverbed, where such lands are subject to the navigational servitude" (*id.* at 240).

[8] See *Department of the Interior and Related Agencies Appropriations for 1980: Hearings Before a Subcomm. of the House Comm. on Appropriations,* 96th Cong., 1st Sess. Pt. 6, at 899-909 (1979); *id.* Pt. 7, at 379-392.

of Oklahoma to determine, under the jurisdictional provisions of Section 2 of the Indian Claims Commission Act of 1946 (ch. 959, 60 Stat. 1050), "any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from the construction of the [McClellan-Kerr Project]." H.R. 2329, 97th Cong., 1st Sess. (1981).[9] The bill was later amended to make clear that the Chickasaw and Choctaw Tribes could bring similar suits (H.R. Rep. 97-453, 97th Cong., 2d Sess. Pt. 1 (1982)). Congress enacted the bill (Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944), thus precipitating the present litigation.

3. The Cherokee Nation filed a complaint (J.A. 6-16) in May 1983, stating two causes of action under Section 2 of the Indian Claims Commission Act of 1946 (60 Stat. 1049). The Tribe contended, first, that the construction of the McClellan-Kerr Project resulted in a Fifth Amendment taking of the Tribe's riverbed interests without just compensation; and second, that even if the United States' actions did not amount to a taking, the failure to pay com-

---

[9] See generally *Cherokee Nation of Oklahoma: Hearings on H.R. 2329 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 3 (1981) [hereinafter cited as *H.R. 2329 Hearings*). Section 2 of the Indian Claims Commission Act permits the Indian tribes to adjudicate legal and equitable claims against the United States as well as claims based upon the the government's failure to engage in "fair and honorable dealings" (60 Stat. 1050). See note 10, *infra*. The bill waived the five-year limitation on actions set forth in Section 12 of the Indian Claims Commission Act (60 Stat. 1052) and the six-year limitation in 28 U.S.C. 2401 and 2501. The Department of Justice, adhering to its policy against special waivers of limitation statutes, opposed the legislation. It noted that the Cherokee Nation had received more than $16 million through previous claims under the Indian Claims Commission Act and similar statutes (*H.R. 2329 Hearings* 27-28). The Department of Justice also expressed its view that the United States' navigational servitude would preclude government liability (*id.* at 56-57).

pensation violated the government's duty to engage in "fair and honorable dealings" with the Tribe (J.A. 11-14).[10] The Tribe demanded compensation, based on fair market value, for occupation of tribal lands (including the value of electrical energy generated at the dam sites), and for past and future loss of sand, gravel and coal (*id.* at 14-16). The United States responded, among other defenses, that the government's navigational servitude precludes liability for the alleged taking and that the exercise of the navigational servitude did not constitute a failure to observe fair and honorable dealings with the Tribe (*id.* at 17-18). Pursuant to the parties' suggestion, the court considered these two questions of law through cross-motions for summary judgment.

The district court granted partial summary judgment in favor of the Tribe (Pet. App. 25a-28a). The court held that this Court's ruling in *Choctaw Nation* created a "unique situation by which a portion of the navigable Arkansas River is, essentially, a private waterway belonging to the Cherokee Nation" (*id.* at 26a). The court further held that the United States, having failed to reserve a navigable servitude in its treaty with a sovereign Indian nation, owed the Tribe just compensation (*id.* at 27a). The court did not address the fair and honorable dealings claim (*id.* at 28a). The court concluded, sua sponte, that its decision "in-

---

[10] Section 2 of the Indian Claims Commission Act permits an Indian tribe to sue the United States based on (60 Stat. 1050):

> (1) claims in law or equity arising under the Constitution, laws or treaties of the United States * * *;
>
> * * * * *
>
> (4) claims arising from the taking by the United States * * * of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant;
>
> (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

volves a controlling question of law as to which there is substantial ground for difference of opinion" (*id.* at 28a) and therefore certified the case, pursuant to 28 U.S.C. (& Supp. II) 1292(b), for interlocutory appeal.

The court of appeals granted the government's petition for interlocutory review (Pet. App. 24a). A divided panel ultimately affirmed the district court's decision, but adopted a different analysis (*id.* at 23a). The court rejected the district court's conclusion that "the failure of the United States to reserve a navigational easement in the treaty grant" operated to defeat its constitutional power under the Commerce Clause, stating that "it is certain the United States retained a navigational servitude in the Arkansas River" (*id.* at 9a). The court nevertheless concluded that the navigational servitude did not protect the United States from liability.

The court stated that "the assertion of a navigational servitude on particular waters acknowledges *only* that the property owner's right *to use* these waters is shared with the public at large" (Pet. App. 10a (emphasis in original)). The court further stated that the scope of the government's navigational servitude therefore depends on whether the navigational improvements interfere with property rights connected to private navigational uses or with property rights connected with other types of uses (*ibid.*). The court concluded—without citing any precedential support—that "[w]hen the exercise of that public power affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due" (*ibid.*).

The court then recited a number of factors that, it concluded, make this case "unique" (Pet. App. 11a). It noted that the Cherokee Nation holds fee simple title to the riverbed (*id.* at 10a), that the Tribe's property interests are secured by treaty (*id.* at 12a), and that the government has a trust relationship with the Tribe (*id.* at 13a). The court

also accepted the Cherokee Nation's contention that the Tribe's ownership of a portion of the Arkansas River's bed "makes the Arkansas a uniquely private waterway held by the United States in trust for the tribe" (*id.* at 15a) and that "this status has not been lost simply because the Tribe has not excluded navigation" (*ibid.*). It summarized its decision as follows (*id.* at 16a):

> The substance of what we hold here is while the United States can exercise the navigational servitude in the waterway which courses through the property of the Cherokees, and while the Cherokees cannot interfere with the exercise of this right of sovereignty, the Cherokees have a right to compensation for any consequent loss of property or diminution of value.

The court then remanded the case for a determination of damages under the taking claim and "whether the fiduciary duty owed by the United States to the Cherokee Nation was breached as a matter of fact" (*ibid.*).

Judge Seth dissented (App., *infra*, 17a-23a). He reasoned that the nature and source of the Tribe's title to the riverbed make no difference in determining the scope of the government's navigational servitude (*id.* at 18a). He also observed that "navigable rivers are 'public property' and have been since the earliest time" (*id.* at 19a). Judge Seth surveyed the numerous decisions of this Court holding that instream and riparian property rights are held subject to the federal government's dominant power to improve navigable waters (*id.* at 19a-22a). He concluded that the "exercise of the servitude is not the taking of property but the exercise of a power to which the property owners have always been subject" (*id.* at 22a). He also explained that the Tribe's treaty rights do not "increase the extent or nature of the Cherokee's title" to create a " 'fee plus' " (*id.* at 23a), observing that there is no authority for treating a naturally navigable waterway as a "private river" or for "creat[ing] an exception to the application of the naviga-

tional servitude because plaintiff is an Indian tribe" (*ibid.*). Finally, Judge Seth rejected the notion that the Cherokee Nation could enlarge its property rights by invoking the United States' trust obligations to the Tribe (*ibid.*).

SUMMARY OF ARGUMENT

The United States' construction of the McClellan-Kerr Project has not resulted in a compensable taking of the Cherokee Nation's property interests. The United States' established power to improve navigation free from claims for compensation—its so-called "navigational servitude"—precludes the Tribal's claims for compensation in this case.

A. The Commerce Clause broadly empowers Congress to improve navigable waters for the public benefit. This Court, construing that authority in light of history and the needs of interstate commerce, has developed the concept of a federal navigational servitude. The concept expresses a firm rule: the United States is not required to pay compensation for damage to instream property resulting from federal navigation improvements. That rule is deeply rooted in Anglo-American law. It has enabled Congress to promote commerce along the nation's great waterways, encouraging the settlement, economic growth, and commercial unification of the country. The navigational servitude thus provides substantial benefits to both riparian and nonriparian interests, upstream and downstream, of all components of the United States, including Indian tribes. This Court, applying the navigational servitude in a wide range of situations, has never deviated from the principle that the United States owes no compensation when the government's navigational improvements impair private instream interests in navigable waters.

B. The Cherokee Nation, like any other owner of in-stream or riparian property rights, is subject to the navigational servitude. This Court has recognized that Indian tribes are subject to the servitude on two separate occasions, in *Montana* v. *United States*, 450 U.S. 544, 555 (1981), involving a title dispute between Montana and the Crow Tribe, and in *Choctaw Nation* v. *United States*, 397 U.S. 620 (1970), the very case that established the Cherokee Nation's property rights in the Arkansas River. That result would be clearly mandated, even in the absence of those decisions. This Court has repeatedly indicated that the servitude applies to *all* holders of riparian and riverbed interests.

The Cherokee Nation's sovereign status certainly provides no basis for exempting the Tribe from the navigational servitude. The states, which possess the full measure of sovereignty permitted by the Constitution, are subject to the servitude. Likewise, the Cherokee Nation is not entitled to an exception on the ground that it received its title to the Arkansas River's bed through a treaty and patent. The United States is not obligated to reserve its constitutional powers through express language in its agreements with the Indian tribes. And the Cherokee Nation's fee simple ownership provides no basis for an exemption. This Court has established that the navigational servitude applies regardless of the character of the property owner's title. Finally, the Cherokee Nation cannot invoke the United States' trust obligations to the Indian tribes as a ground for an exemption. The trust relationship cannot create property rights where none would otherwise exist.

In sum, there is no plausible ground for exempting the Cherokee Tribe from the United States' navigational servitude—and no basis for the court of appeals' novel redefinition of the navigational servitude to accomplish that result. Indeed, that redefinition cannot be reconciled with this Court's holdings applying the servitude.

Moreover, the Cherokee Nation's demand for compensation, if allowed, would amount to a substantial toll on commerce along the Arkansas River. The recognition of this claim would be particularly incongruous because the Cherokee Nation has been among the historic beneficiaries of federal navigation improvements. Furthermore, it would upset settled expectations, encourage litigation over long settled doctrine, and perhaps ultimately discourage the construction and maintenance of navigation projects that benefit the public at large.

ARGUMENT

THE CHEROKEE NATION IS NOT ENTITLED TO COMPENSATION FOR IMPAIRMENT OF INSTREAM TRIBAL PROPERTY RESULTING FROM THE CONSTRUCTION AND OPERATION OF THE McCLELLAN-KERR PROJECT

A. The United States Is Not Obligated to Pay Compensation for Impairment of Instream Property Resulting From the Construction and Operation of Federal Navigation Improvement Projects

The Commerce Clause broadly empowers Congress to improve navigable waters for the public benefit. This Court, construing that authority in light of history and the needs of interstate commerce, has developed a firm rule: the United States is not required to pay compensation for damage to instream property resulting from federal navigation improvements.

1. "The Commerce Clause confers a unique position upon the Government in connection with navigable waters." *United States* v. *Rands*, 389 U.S. 121, 122 (1967). It broadly empowers the government to protect, regulate, and improve navigable waters for commercial use (*id.* at 122-123). "This power to regulate navigation confers upon the United States a 'dominant servitude,' *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954), which extends to the entire stream and the stream bed below the high water mark." *Rands*, 389 U.S. at 123. The United States, in the exercise of its navigational servitude, may

improve navigable waters free from claims for compensation from persons or entities claiming property interests in the stream or the underlying lands. As this Court has explained (*ibid.*):

> The proper exercise of this power is not an invasion of any private property rights in the stream or in the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.

History demonstrates that navigable waters are a unique national resource that provide important public benefits. They are singularly valuable because they provide natural access to inland territories; they are concomitantly imbued with a particular public interest that derives from free public use.[11] As Chief Justice Marshall presciently realized, federal control over "the deep streams which penetrate our country in every direction" (*Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1833)) was essential to the commercial unification of the country. The nation's great

---

[11] The middle ages witnessed the destructive effect of "private ownership" of navigable waters—the imposition of monopolistic tolls that provided a windfall to the owner at the public's expense. As one historian explained (D. Hay, *Europe in the Fourteenth and Fifteenth Centuries* 361-362 (1966)):

> Rivers were navigated wherever possible * * *. Nevertheless, the disadvantages of rivers were in some ways even greater than roads, for they attracted the predatory lord who imposed tolls on the traffic passing through his territory. * * *. There were tolls on the Seine and the Garrone every six or seven miles. Other continental rivers were sometimes even more heavily oppressed; at the start of the fourteenth century there were thirty-five tolls on the Rhine and this had nearly doubled by 1500. Where monarchy was strong (as in England) this never became an impediment; * * * but in general by the fourteenth century the inland transport of anything but small and precious commodities, or of local goods going relatively short distances, tended to be expensive.

waterways, such as the Mississippi, Missouri, and Arkansas rivers, opened the American frontier to settlement and, even now, serve as vital arteries for the country's economic sustenance and growth.[12]

This Court, attentive to history and the needs of interstate commerce, concluded that navigable waters, in this context, must be recognized as " 'public property of the nation, and subject to all the requisite legislation by Congress.' " *Wyandotte Co.* v. *United States,* 389 U.S. 191, 201 (1967) (citation omitted); *United States* v. *Rands,* 389 U.S. at 123; *United States* v. *Chicago, M., St. P. & P. R.R.,* 312 U.S. 592, 595-597 (1941); *Gilman* v. *Philadelphia,* 70 U.S. (3 Wall.) 713, 724-725 (1865). The navigational servitude reflects a considered judgment that the public interest in free navigation imposes a corresponding limitation on rights in riparian and riverbed lands. The Court has applied the navigational servitude broadly in recognition that the public interest in navigation, long acknowledged in Anglo-American law, decisively overrides the assertion of private instream rights. See *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 69 (1913); see also *Scott* v. *Lattig,* 227 U.S. 229, 242-243 (1913); *Railroad Co.* v. *Schurmeir,* 74 U.S. (7 Wall.) 272, 288 (1868); *Martin* v. *Waddell,* 41 U.S. (16 Pet.) 367, 414 (1842).[13]

---

[12] "What would the West now have been if steam had not been introduced upon our rivers, and their navigation had not remained free? Without an outlet for the products of a prolific soil and the instruments of mechanical ingenuity, the country could have made but little advance." *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 54 U.S. (13 How.) 518, 577 (1851). It is certainly no coincidence that most of the Nation's major cities are located on navigable waterways.

[13] Congress has recognized this principle as well, stating that "[a]ll navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways" (43 U.S.C. 931). The sovereign's unique interest in protecting the public's interest in navigable waters is deeply rooted in American and English law. See,

2. This Court, applying the navigational servitude doctrine in a wide range of situations, has never deviated from the fundamental constitutional principle that the United States owns no compensation when the government's navigational improvements impair private interests in navigable waters.[14] The doctrine applies with conclusive

---

e.g., Act of May 18, 1796, ch. 29, § 9, 1 Stat. 468 ("all navigable rivers, within the territory to be disposed of by virtue of this act, shall be deemed to be, and remain public highways"); Act of June 1, 1796, ch. 46, § 6, 1 Stat. 491 (accord); Act of Mar. 3, 1803, ch. 27, § 17, 2 Stat. 235 (accord); *Commonwealth* v. *Charlestown,* 18 Mass. (1 Pick.) 180, 184 (1822) ("Those who thus acquired the property of the shore [under a 1641 colonial ordinance] were restricted from such a use of it as would impair the public right of passing over the water * * *."); J. Angell, *A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* 28-29 (1826) ("By the common law all arms of the sea, navigable rivers, & c. are considered as public highways * * *.).

[14] *E.g., Rands,* 389 U.S. at 122-124 (loss of a potential port site on riparian lands); *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 231-233 (1960) (loss of upstream hydropower opportunities); *United States* v. *Twin City Power Co.,* 350 U.S. 222, 224-226 (1956) (loss of a hydropower site on riparian lands); *United States* v. *Willow River Power Co.,* 324 U.S. 499, 511 (1945) (loss of upstream hydropower opportunities); *United States* v. *Commodore Park, Inc.,* 324 U.S. 386, 390-391 (1945) (damage to a stream bed; loss of riparian access); *United States* v. *Chicago, M., St. P. & P. R.R.,* 312 U.S. 592, 595-597 (1941) (damage to an embankment built within navigable waters); *Willink* v. *United States,* 240 U.S. 572, 579-580 (1916) (prohibitions on the rebuilding on a wharf and piling); *Greenleaf Lumber Co.* v. *Garrison,* 237 U.S. 251, 268 (1915) (removal of a wharf); *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs,* 229 U.S. 82, 89 (1913) (destruction of oyster beds within a harbor bed); *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 71-72 (1913) (loss of hydropower opportunities); *West Chicago Street R.R.* v. *City of Chicago,* 201 U.S. 506, 524-525, 527-528 (1906) (removal of a tunnel beneath the bed of a navigable river); *Scranton* v. *Wheeler,* 179 U.S. 141, 163-165 (1900) (loss of riparian access); *Gibson* v. *United States,* 166 U.S. 269, 271-272 (1897) (loss of riparian ac-

force when the United States' navigational improvements damage property within the bed of a naturally navigable body of water. *E.g., United States* v. *Commodore Park, Inc.,* 324 U.S. 386, 390 (1945); *United States* v. *Chicago, M., St. P. & P. R.R.,* 312 U.S. at 596-597. This Court, more than 70 years ago, unequivocally confirmed that the United States owes no compensation even if its navigational improvements completely destroy such property. *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs,* 229 U.S. 82 (1913).

In *Lewis,* the plaintiff cultivated oysters on leased lands beneath Great South Bay, New York. The United States dredged the bay to improve navigation, destroying the plaintiff's oyster beds. This Court rejected the plaintiff's demand for just compensation, stating (229 U.S. at 88):

> By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff in error has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep water channel across it, entitles him to demand compensation as a condition.

The Court relied in part (*id.* at 88-89) on its prior decision in *Scranton* v. *Wheeler,* 179 U.S. 141, 163 (1900), adding:

> The whole subject of the nature and character of the interest of the owner of such a title and the scope of the control of the Congress over navigable rivers has been fully considered by this court in *United*

---

cess); See also *South Carolina* v. *Georgia,* 93 U.S. 4, 10-12 (1876) (refusing to enjoin federal navigational improvements that diminished stream flows in the Savannah River).

> *States* v. *Chandler-Dunbar Water Power Co.*, [229 U.S. 53 (1913)], where the decision in *Scranton* v. *Wheeler* was fully affirmed.

See also, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175-176 (1979) (quoting *Chandler-Dunbar* and *Scranton* with approval); *Rands*, 389 U.S. at 123-124.

The navigational servitude does not, of course, "create a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation." *Kaiser Aetna*, 444 U.S. at 172. "The navigational servitude of the United States does not extend beyond the high-water mark. Consequently, when fast lands are taken by the Government, just compensation must be paid." *Rands*, 389 U.S. at 123.[15] Similarly, when the government opens a private pond—made navigable through private efforts—to public use against the wishes of its owner, this Court has concluded that just compensation is due. *Kaiser Aetna*, 444 U.S. at 178-180. But the rule has been decisively settled—through " 'battles long ago' " (*id.* at 177)—that the United States is not constitutionally obligated to pay compensation when the construction or operation of a federal navigational improvement project impairs property within the bed of a naturally navigable river.

B. The Cherokee Nation is Subject to the Established Rules Governing Federal Navigational Improvements

The Cherokee Nation seeks compensation for impairment of instream property interests resulting from the McClellan-Kerr Project, a federal navigation improve-

---

[15] Notably, however, the United States bears no constitutional obligation to compensate the owner of fast lands for value attributable to riparian location. See *Rands*, 389 U.S. at 123-125. Congress has authorized such compensation as a matter of legislative grace. 33 U.S.C. 595(a).

ment plan. As previously demonstrated—and as the Tribe seemingly admits (Br. in Opp. 11-12)—this claim, if raised by any other owner of such interests, would surely be rejected. There is no reason to create a special exception for the Cherokee Nation—and much reason not to do so. The Cherokee Nation, like any other owner of instream or riparian property interests, is subject to the United States' navigational servitude.

1. This Court has already recognized that Indian tribes are subject to the United States' power under the Commerce Clause to regulate and improve navigation. See *Montana* v. *United States,* 450 U.S. 544, 555 (1981). The Court, in determining whether the State of Montana or the Crow Tribe owned title to the bed of the Big Horn River, stated (*ibid.*):

> As the Court of Appeals recognized [*United States* v. *Finch,* 548 F.2d 822, 834 n.25 (9th Cir. 1976)] and as the respondents concede, the United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who [Montana or the Crow Tribe] owns the riverbed.

Indeed, this Court had previously expressed the same principle in *Choctaw Nation* v. *Oklahoma, supra,* the very case that established the Cherokee Nation's instream property rights in the Arkansas River.

In *Choctaw Nation,* the Court was sharply divided on the question whether the Indian Tribes or the State of Oklahoma owned the bed of the Arkansas River. However, the Court was in full agreement that the United States retained its navigational servitude no matter who held title to the riverbed. The majority opinion cited the existence of the navigational servitude as support for its

conclusion that the United States intended to convey title to the Indian Tribes. The Court explained (397 U.S. at 635):

> Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce.

The dissenting opinion agreed that the navigational servitude could not have been extinguished, stating (397 U.S. at 652-653 (White, J., dissenting)):

> No one suggests that the Cherokees were granted full sovereignty over the Arkansas River, that the United States had conveyed away its power to control navigation and commerce on the Arkansas, or that the public had lost its right to travel the navigable portion of the Arkansas by virtue of the conveyance to the Cherokee Nation.

These statements were in no sense inadvertent. The navigational servitude figured prominently in the briefing and argument of *Choctaw Nation.* The Indian tribes, throughout that case, repeatedly maintained that their riverbed interests are subject to the United States' navigational servitude. The Cherokee Nation, in its opening brief, stated that "there is nothing in the conveyance of title to the land beneath the navigable waters which conflicts with the power of the Government to hold such lands for navigation. *Moore* v. *United States,* 157 F.2d 760 (9th Cir. 1946)." Cherokee Nation Br. 19. See also Choctaw and Chickasaw Nations Br. 48-49; United States Br. 24. The Tribe forcefully reiterated this point in its reply brief, specifically stating (Cherokee Reply Br. 13-14):

> Throughout their brief respondents imply that if title to the river were vested in the [Tribe] and not in the state (under the equal footing-implied trust doctrine) the authority and power of the United States could somehow be compromised. Such an inference is ab-

> surd; no matter who holds title to the riverbed, the [Tribe] or the state, the rights and power of the United States are precisely the same.

The Tribes repeated this point at oral argument, stating (Tr. Oral Arg. 14-15 (Oct. 22, 1969)):

> So all the United States did, and the United States did that in its treaties with the Indians, and we point that out in our brief, that they reserved a navigation easement. They have always exercised it. They exercised it long after the Indians moved to Oklahoma.

The United States, participating as amicus curiae in support of the Tribes, agreed that the federal government retained its navigational servitude. It stressed that point in both the original argument (*id.* at 4-5 (Oct. 23, 1969)) and on reargument several months later (*id.* at 25, 29 (Mar. 5, 1970)).

Thus, the Court's observation in *Choctaw Nation* that the United States retained its navigational servitude was made in response to the clearly articulated—and correct—arguments of the United States and the Indian tribes.

2. Indeed, it would be entirely clear, even in the absence of this Court's decisions in *Montana* and *Choctaw Nation,* that the United States' navigational servitude precludes the Cherokee Nation's claim for compensation. This Court has repeatedly indicated that the navigational servitude applies without exception to *all* holders of riparian and riverbed interests. "When the United States appropriates the flow either of a navigable or a non-navigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one." *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 233 (1960). There is no reasonable basis for excepting the Tribe from the United States' Commerce Clause powers.

The court of appeals concluded otherwise, stating—without any precedential support—that (Pet. App. 10a):

> When the exercise of [the navigational servitude] affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due.

This is a novel and serious misstatement of the law, at least with respect to interests within the bed of a navigable river.[16] This Court has never held that the scope of the United States' servitude depends on the private owner's use of the submerged lands. To the contrary, the Court has consistently and categorically denied compensation for instream damage resulting from a federal navigation project, regardless of the private property owner's instream use.[17] The governing rule in the instant case is plain and

---

[16] The court of appeals' ruling apparently originates in a misreading of cases dealing with compensation for navigational improvements that impair property *above* the high water mark. See Pet. App. 10a. The general rule, set forth in *Rands,* states that an owner is entitled to compensation for the taking of fast lands, but value attributable to riparian location, such as power site or port site value, is noncompensable absent a specific statutory allowance. 389 U.S. at 123-125. That rule has no application to this case since the Tribe owns only the stream bed.

[17] For example this Court has held—without any balancing of interests—that no compensation is due when the government's navigational improvements result in instream damage to railroad embankments (*United States* v. *Chicago, St. P. & P. R.R.,* 312 U.S. at 599) or the destruction of oyster beds (*Lewis Blue Point Oyster Cultivation Co.* v. *Briggs,* 229 U.S. at 87-89), when they require the removal of bridges placed within navigable waters (*Louisville Bridge Co.* v. *United States,* 242 U.S. 409, 421 (1917); *Union Bridge Co.* v. *United States,* 204 U.S. 364, 400-401 (1907)) or tunnels dug beneath the bed (*West Chicago Street R.R.* v. *City of Chicago,* 201 U.S. 506 (1906)), and when they prevent the use of stream flow for hydropower

firmly established: the government owes no compensation when navigational improvements impair or destroy property located within the bed of a naturally navigable body of water. The court's use of an ad hoc balancing test—the same generic test used in a general takings analysis—ignores a century of contrary precedent. It reduces the United States' navigational servitude to no more than a mere right to ply navigable waters. As we shall now show, neither the court nor the Cherokee Nation has identified any plausible basis for departing from the established application of the navigational servitude.

a. The Cherokee Nation's sovereign attributes plainly provide no ground for exempting the Tribe from the traditional reach of the navigational servitude. The United States exercises expansive authority over navigable waters specifically to ensure that, notwithstanding the nation's constituent sovereigns, interstate trade will be conducted in a unified national economy (see pages 17-19). The states, which possess the full measure of sovereignty allowable under the Constitution (U.S. Const. Amend X), are subject to the servitude.[18] Indian tribes, which possess only "quasi-sovereign" status at the sufferance of Congress,[19] and which have been divested of elements of

---

development activities (*United States* v. *Grand River Dam Authority*, 363 U.S. at 231; *United States* v. *Twin City Power Co.*, 350 U.S. at 225-226; *United States* v. *Willow River Power Co.*, 324 U.S. at 509; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 72).

[18] *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 63 (" 'although the title to the shore and submerged soil is in the various States and individual owners under them, it is aways subject to the servitude * * *' ") (quoting *Gibson* v. *United States*, 166 U.S. 269, 271 (1897)); see also, *e.g.*, *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 423 (1940); *United States* v. *Oregon*, 295 U.S. 1, 14 (1935); *United States* v. *Holt State Bank*, 270 U.S. 49, 54 (1926); *New Jersey* v. *Sargent*, 269 U.S. 328, 337 (1926).

[19] *Montana* v. *United States*, 450 U.S. at 563-564; *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 207-210 (1978).

sovereignty " 'inconsistent with the overriding interests of the National Government,' " [20] must likewise be subject to this Commerce Clause restraint. See U.S. Const. Art. I, § 8.

b. Likewise, the Cherokee Nation is not entitled to an exception on the ground that it received its title through a treaty with, and patent from, the United States. The Cherokee Nation, like any owner of lands beneath navigable waters, took its riverbed interest subject tc the federal government's dominant power under the Commerce Clause to regulate and promote navigation. The United States was not obligated to make an express reservation of that power in the treaty or patent. The retention of sovereign authority is implicit in government agreements " 'unless surrendered in unmistakable terms.' " *Bowen* v. *Public Agencies Opposed to Social Security Entrapment,* No. 85-521 (June 19, 1986), slip op. 10-11 (quoting *Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130, 148 (1982)).[21] This principle holds true in the case of Indian treaties. For example, this Court recognized long ago that Cherokee lands are subject to the government's power of eminent domain, stating:

> It would be very strange if the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several States, and could not exercise the same power in a Territory occupied by an Indian nation or tribe, the members of ~~which~~ which were wards of the United States, and directly subject to its political control.

---

[20] *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. 324, 332 (1983) (quoting *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 153 (1980)).

[21] See also *City of El Paso* v. *Simmons,* 379 U.S. 497, 508-509 (1965); *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 434-435 (1934); *Gajewski* v. *United States,* 327 F.2d 239, 241 (8th Cir. 1964).

Cherokee Nation v. *Southern Kansas Ry.*, 135 U.S. 641, 656-657 (1890).[22] The Cherokee Nation is not entitled to a special exemption from the servitude simply because it acquired its property rights by nineteenth century treaty. Even persons who hold property rights that predate the formation of the Union—including title to submerged lands within the original thirteen colonies—are subject to the navigational servitude. See *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U.S. at 86; cf. *South Carolina* v. *Georgia*, 93 U.S. 4, 10 (1876).[23]

c. Furthermore, the Cherokee Nation cannot claim an exemption from the servitude on the ground that it holds fee simple title to submerged lands. There is nothing unusual, with respect to the navigational servitude, about fee simple ownership of riverbed interests.[24] This Court has long held that "although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in

---

[22] See also FPC v. *Tuscarora Indian Nation*, 362 U.S. 99, 120-123 (1960); *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 484 (1899); *Choctaw Nation* v. *United States*, 119 U.S. 1, 27 (1886); *Mackey* v. *Coxe*, 59 U.S. (18 How.) 100, 103 (1855); 6 Op. Att'y Gen. 302, 308 (1854); 2 Op. Att'y Gen. 693 (1834); 2 Op. Att'y Gen. 402 (1830).

[23] Notably, in *Lewis*, the plaintiff cultivated oysters on leased lands that were originally conveyed by royal patent from Great Britain during the colonial period. 229 U.S. at 86, aff'g; 198 N.Y. 287, 288 (1910). The United States' navigational servitude nevertheless applied (see page 21, *supra*).

[24] The states, under the Equal Footing Doctrine, generally acquire fee simple title to lands beneath navigable waters upon their entry into the Union. See, *e.g.*, *Montana* v. *United States*, 450 U.S. at 551. And private parties may hold fee simple title to lands beneath navigable waters through grants from the federal and state governments (see, *e.g.*, *id.* at 551-552) or by principles of state property law (see, *e.g.*, *United States* v. *Commodore Park*, 324 U.S. at 390; *United States* v. *Chicago, M., St. P. & P. R.R.*, 312 U.S. at 596; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 60-61).

respect of navigation created in favor of the Federal government by the Constitution." *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 63 (quoting *Gibson* v. *United States*, 166 U.S. at 272). The Court, in *West Chicago Street R.R.* v. *City of Chicago*, 201 U.S. 506 (1906), specifically rejected any distinctions based on the quality of the property owners' title. In that case, a railroad had placed a tunnel beneath the bed of a navigable river. The Court required the railroad to remove the tunnel—at the railroad's expense—to permit navigational improvements, stating (*id.* at 520):

> Great stress is placed by the railroad company on the fact that is it the owner in fee of the bed of the river at the point where the tunnel was constructed. But that fact is not vital in the present discussion; for it was adjudged by the state court—in harmony with settled doctrines, as will presently appear—that * * * "in a navigable stream the public right is paramount, and the owner of the soil under the bed of such a stream can only use and enjoy it in so far as consistent with the public right * * *" [quoting 214 Ill. 9, 20].

There is no reason why the Cherokee Nation's title should be treated differently.

d. Finally, the Cherokee Nation cannot invoke the United States' trust obligations to the Tribe as a basis for an exemption. The Tribe's right to compensation depends on constitutional principles defining the Cherokee Nation's property rights in the underlying riverbed. A trust relationship does not expand those rights. It may create an obligation to administer or protect property rights already in existence (see, *e.g.*, Restatement (Second) of Trusts § 2 (1959)), but it cannot create property rights where none would otherwise exist. The crucial inquiry in the present case is whether the Tribe's ownership of the bed of the Arkansas River establishes a right to compensation for alleged damage resulting from the McClellan-Kerr Project.

As the preceding discussion demonstrates, the Cherokee Nation has no greater property right in submerged lands than a state, a private individual, or other non-federal entity. The Tribe's invocation of trust principles does not alter that fundamental fact.[25]

3. The foregoing discussion demonstrates that there is no plausible ground for exempting the Cherokee Nation from the established rule that the United States need not pay compensation when federal navigational improve-

---

[25] Indeed, the cases cited by the court of appeals and the Cherokee Nation—*United States* v. *Sioux Nation*, 448 U.S. 371 (1980), and *United States* v. *Creek Nation*, 295 U.S. 103 (1935)—illustrate that trust principles are not relevant to the present controversy. In those cases, the United States defended specific transactions with the Indian tribes on the theory (originating in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903)) that the United States cannot be held liable for actions taken in the exercise of its trust power to manage and control tribal affairs. See *Sioux Nation*, 448 U.S. at 409-410; *Creek Nation*, 295 U.S. at 109-110. This Court rejected the United States' position under the facts of these cases, concluding that the United States remained liable to the Tribes under traditional legal standards, *notwithstanding* its special trust powers. The Court stated (*Sioux Nation*, 448 U.S. at 415 (quoting *Creek Nation*, 295 U.S. at 109-110)):

> In every case where a taking of treaty protected property is alleged, a reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that "this power [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in * * * a guardian [relationship] and to pertinent constitutional restrictions."

Sioux Nation and *Creek Nation* establish that the United States cannot invoke its trust powers to excuse the federal government's noncompliance with constitutional requirements. But those cases do not support the Cherokee Nation's quite different contention that the trust relationship somehow alters the applicable constitutional standards or creates property rights where none would otherwise exist. See *Sioux Nation*, 448 U.S. at 409 n.26.

ments impair instream property. Indeed, the requested exemption would be inconsistent with the basic objectives of that rule.

The navigational servitude, a concept deeply rooted in history (pages 18-19, *supra*), enables Congress to promote commerce along the nation's great waterways. Absent the servitude, navigational improvements benefiting the entire nation could be held hostage by the claims of individual stream bed owners to "just compensation." These owners, like the feudal lords of the middle ages, would exact their tolls on the general public, burdening interstate transportation and ultimately impeding the free flow of the nation's commerce.

The Cherokee Nation's claim illustrates the magnitude of that threat. The Tribe contends that the McClellan-Kerr Project, vital to the commerce of the Southern Plains states, has impaired its partial ownership interest in an 87-mile stretch of the Arkansas River. If the Tribe is permitted to proceed on this claim, it presumably will demand royalties of $60 million for the past use of its portion of the riverbed (Br. in Opp. 7 n.15); the two other tribes holding title to portions of that stretch of the riverbed—the Choctaw and Chickasaw Nations—will likely present additional claims for past royalties in the amount of $48 million (*ibid.*). The Cherokee Nation's appraisal further states that the Cherokee, Choctaw, and Chickasaw Nations are collectively entitled to *future royalties* in the amount of $140 million *every 25 years* (1 W.R. Holway & Associates, *Arkansas Riverbed Project* 3-1 to 3-3 (Nov. 1984)).

The Cherokee Nation's claim is also somewhat ironic in light of the history of navigational improvements on the Arkansas River. As we have previously explained, the United States initiated navigational improvements on the Arkansas River prior to the Treaty of New Echota (see pages 3-4, *supra*). These navigational improvements brought trade and commerce to the Indian Territory that

doubtlessly benefited the Tribe.[26] Indeed, the navigational projects—which required the expenditure of public funds and, perhaps, burdened downstream landowners—were often justified, in part, as promoting commerce within the Indian Territory (see pages 3-4, *supra*). The Cherokee Nation, having enjoyed direct benefits from river improvement projects that depended upon the United States' exercise of its navigational powers, now seeks to tax the development of similar opportunities for upstream interests and those who wish to trade with them.[27]

This irony further illustrates the rationale of the servitude's firm rule precluding claims for just compensation based on instream damage from federal navigation im-

---

[26] The Army Corps of Engineers described the Arkansas River trade as follows (H.R. Exec. Doc. 295, *supra,* at 33):

> Twenty steamboats, averaging three hundred tons burdens, now ply between Fort Gibson, Fort Smith, Little Rock, and New Orleans, Memphis, St. Louis, and Cincinnati. Seven boats are engaged in the White River trade. The amount of up and down river trade, received and shipped at Fort Gibson, Indian Territory, is about 25,000 tons annually, exclusive of government freight. It consists of robes, hides, and furs, shipped from Fort Gibson, and merchandise brought from New York, Philadelphia, Cincinnati, St. Louis, and New Orleans.
>
> The government freight received at the same point amounts to about $5,000,000 annually. It consists of dry-goods, groceries, hardware, machinery, and sutlers' stores. This includes all merchandise to be forwarded to the Creek and Seminole agencies, North Fork, Ocmulgee, and to trading posts generally throughout the interior, which are too far distant from Fort Smith to make it profitable to haul goods overland from this point.

[27] Indeed, the Tribe maintains, despite all history to the contrary, that the Arkansas River is a "private waterway" (see Pet. App. 15a; 26a). That contention is, of course, meritless. Navigable waters are " '[incapable] of private ownership' " (*Kaiser Aetna,* 444 U.S. at 179 (quoting *Chandler-Dunbar Co.,* 229 U.S. at 69)).

provement projects. Navigational improvements provide direct or indirect benefits for the entire public, whether upstream or downstream, riparian or non-riparian, Indian or non-Indian. The traditional constitutional rule, precluding all claims based on compensation for instream damage, should apply correspondingly to the entire public as well. If there are cases of special hardship or loss, Congress—the branch of government charged with the appropriations power (U.S. Const. Art. I, § 9, Cl. 7)—can provide the appropriate remedy. See *United States* v. *Willow River Power Co.*, 324 U.S. 499, 510 (1945) ("Such losses may be compensated by legislative authority, not by force of the Constitution alone.").[28]

Congress, thus far, has declined to authorize special payment to the Cherokee Nation for damage to its instream interests, despite the Tribe's specific and repeated requests (see page 10, *supra*). Instead, Congress has permitted the Tribe to seek a judicial remedy (to the extent one is available) based on traditional legal doctrines governing such disputes.[29] Even if its judicial claims are rejected, the Cherokee Nation may return to Congress for relief.

---

[28] Congress, on several occasions, has provided compensation where the navigational servitude would otherwise preclude government liability. For example, Congress has permitted compensation for the occupation of fast lands beyond what this Court's decision in *Rands* would allow. See 33 U.S.C. 595(a) (providing that fast lands taken for navigational purposes shall be valued "based upon all the uses to which such property may reasonably be put"). And Congress has permitted oystermen to seek damages for destruction of oyster beds cultivated on private lands, notwithstanding this Court's decision in *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs, supra.* See 28 U.S.C. 1497.

[29] In addition to its claim for just compensation, the Tribe has sought damages based on Section 2(5) of the Indian Claims Commission Act, which permits claims based on the government's failure to

Under these circumstances, there are simply no grounds for distorting the established contours of the navigational servitude. A departure from the established rule would upset settled expectations and encourage litigation over long settled doctrine. It might ultimately lead to windfalls for instream property owners at the public expense and discourage the construction and maintenance of navigation projects that benefit the public at large.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
JACQUES B. GELIN
Attorneys

NOVEMBER 1986

---

engage in "fair and honorable dealings" with Indian tribes. See note 10, *supra*. We urged the district court to reject that claim. As we explained below, the government does not engage in unfair or dishonorable dealings by refusing to pay an Indian tribe for impairment of noncompensable interests or by exercising valid constitutional powers that advance the general public interest. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 128 (1983). The district court did not rule on this issue.

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40085